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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 189

ROBERT W. MORRIS,
Plaintiff and Appellant,
vs.
FORD MOTOR COMPANY,
a Delaware Corporation,
Defendant and Appellee

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION

MORTON A. EDEN,
BENJAMIN MARCUS, and
JEROME W. KELMAN,
Attorneys for Plaintiff and Appellant,
3220 Barium Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 170 East Larned St., Detroit 26, Michigan

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The defendant's Motion to Dismiss contends that this case is not within the jurisdiction of the United States Supreme Court. In support of this contention it presents three major arguments. Counsel for plaintiff respectfully submit that defendant's contentions are clearly untenable and in error.

I.

THE FEDERAL QUESTION WAS PROPERLY PRESENTED AT THE FIRST OPPORTUNITY AND IS THEREFORE TIMELY

The defendant argues that since the federal question was raised for the first time in the Supreme Court of Michigan in plaintiff-appellant's reply brief, it was not timely. Counsel for plaintiff submit that this contention is a *non-sequitur*. The time to raise the federal question varies according to the circumstances in a particular case. Defendant ignores the background of the proceedings herein.

The trial court's decision on the constitutional question was in accord with plaintiff's contention and therefore raised no constitutional problem. (See Statement in Support of Jurisdiction for quotation of the trial court's holding.) The trial court specifically held that plaintiff's alleged injury arose out of and in the course of his employment and was within the jurisdiction of the Michigan Workmen's Compensation Commission. The opinion further holds that if the Compensation Commission was without jurisdiction, the plaintiff would have a remedy at law. The doctrine of waiver and election was affirmatively rejected. The trial court's decision therefore did not raise any constitutional question. Plaintiff's appeal was from the determination of the trial court that his alleged injury was within the jurisdiction of the Compensation Commission and involved only the interpretation of state law.

However, the defendant, notwithstanding its failure to appeal from the decision of the lower court, in its brief on appeal contended that plaintiff had waived his right to proceed at law because he had filed a claim with the Compensation Commission. As has been pointed out, this was *not* the basis for the trial court's decision *and had been*

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expressly rejected by it. This contention was thus injected into the Michigan Supreme Court proceedings for the first time in defendant's brief. Plaintiff met this contention promptly at the first opportunity thereafter, namely in his reply brief, therein taking the position that such a construction of the act would be in conflict with the United States constitutional guarantee of due process of law. This is conceded by the appellee in Paragraph I of its motion.

The Michigan Supreme Court, although affirming the decision of the trial court, did not do so for the same reasons upon which the trial court rested its decisions and upon which plaintiff had based his reasons and grounds of appeal. Instead, the Michigan Supreme Court based its decision on other grounds, which were injected into the appellate proceedings for the first time by defendant's brief, and to which plaintiff promptly raised constitutional objections in his reply brief.

Since the Michigan Supreme Court did not in its opinion discuss the constitutional question, plaintiff filed an application for rehearing clearly and specifically raising the constitutional objections to the court's construction of the statute. The Michigan Supreme Court denied the application without opinion.

Under these circumstances, plaintiff's raising of the federal question was timely. In the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 218 U. S. 673, 50 S. C. 451, 74 L. Ed. 1107, the court held that it is timely to raise the federal claim at the first opportunity presented even though this may occur during proceedings in the highest state court.

This court held in a subsequent opinion that the constitutional question is not urged too late on application for

rehearing when the grounds for the decision of the State Supreme Court supply a new and unexpected basis for the defeated party's claim of the denial of a federal right. See:

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U. S. 358, 53 S. C. 145, 77 L. Ed. 360, 85 A. L. R. 254.

Saunders v. Shaw, 244 U. S. 317, 37 S. C. 638, 61 L. Ed. 1163;

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Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U. S. 313, 50 S. C. 326, 74 L. Ed. 870.

II.

THE DECISION OF THE MICHIGAN SUPREME COURT DEPRIVES THE PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS AND IS NOT PREDICATED ON NON-FEDERAL GROUNDS

(1) Paragraph II (1) of defendant's Motion to Dismiss is merely a restatement of Paragraph I. Counsel for plaintiff repeat that the federal question was raised at the first opportunity and was, therefore, timely (See Paragraph I).

(2) The defendant's contention that the decision of the Compensation Commission is not final and, therefore, forms a non-federal basis for the decision of the Michigan Supreme Court is without merit.* This argument was the basis of the lower court's decision, from which plaintiff appealed, but is clearly not the basis for the decision of the Michigan Supreme Court.

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*As a matter of fact, the plaintiff did file an Application for Leave to File a Delayed Appeal with the Michigan Supreme Court to obtain a review of the decision of the Compensation Commission, and this was denied, without opinion, prior to the decision in the instant case.

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In the case of *Grayson v. Harris*, 367 U. S. 352, 358, 45 S. C. 317, 69 L. Ed. 652, the court said:

> "The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not."

See, also:

Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 16, 17, 55 S. C. 12, 79 L. Ed. 171;

International Steel and Iron Co. v. National Surety Co., 297 U. S. 657, 56 S. C. 619, 80 L. Ed. 961;

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Dobbins v. Erie County, 16 Pet. 435, 444, 445, 10 L. Ed. 1022.

The Supreme Court of Michigan based its decision squarely on the ground that plaintiff's right to a suit at common law was waived by his filing of a claim with the Compensation Commission even though the Commission had no jurisdiction in the matter. The Court relied on Section 1 of Part VI (Michigan Compiled Laws 1929, §8478) as authority for its action. Plaintiff challenges the constitutionality of that provision as construed by the Michigan Supreme Court.

(3) The issue presented by the defendant in Paragraph II (3) is merely a restatement of the federal question involved. Defendant's bald conclusion that: "This is purely a question of state law, and is of itself conclusive

of the case", is totally unsupported and wholly unwarranted by the facts or by the law.

Whether the decision of the Michigan Supreme Court is based upon its construction of the statute or upon its interpretation of the common law of the state is immaterial. The federal guarantee of due process extends to all state actions, judicial as well as legislative. *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.* See, also, *Saunders v. Shaw, supra,* where the court said:

> "The denial of rights given by the Fourteenth Amendment need not be by legislation."

The question of whether either the statute or common law of Michigan, as construed by the Michigan Supreme Court, deprives the plaintiff of his sole remedy for a wrong is a constitutional question. The plaintiff contends that he has certain basic rights protected by the constitution and that he is entitled to a remedy for any infringement of these rights. The state cannot deprive him of his sole remedy without supplying him with a substitute. To destroy the remedy is to destroy the right.

See: *New York Central Railroad Co. v. White,* 243 U. S. 188, 37 S. C. 247, 61 L. Ed. 667;
Truax v. Corrigan, 257 U. S. 312, 42 S. C. 124, 66 L. Ed. 254;
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Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107, 50 S. C. 451;
York v. State of Texas, 137 U. S. 15, 34 L. Ed. 604, 11 S. C. 9.

The Michigan Supreme Court held that plaintiff had made an election of remedies. Whether this determination is predicated on the court's interpretation of a state statute or of the common law is immaterial (see *supra*). As the decision deprives the plaintiff of his guaranteed rights without due process of law, it must be reversed.

In *Southern Pacific Company v. Bogert*, 250 U. S. 483, 63 L. Ed. 1099, the court held that the term "election of remedies" means a choice between two *available* remedies. Where one chooses an imagined remedy which does not actually exist, there is no estoppel by election. See, also,

Marceau v. Great Lakes Transit Co., 53 F. S. 594, affirmed in 146 F. (2d) 416, certiorari denied 65 S. C. 1018, 324 U. S. 872, 89 L. Ed. 1426;
Hogan v. New York Central and H. R. R. Co., 223 F. 890.

These cases clearly establish that the term "election of remedies" means only what it says—an election between existing remedies. Where only one remedy is available, an erroneous claim under a non-existent remedy cannot create an estoppel.

In effect, therefore, the Michigan Supreme Court's decision deprives the plaintiff of his only remedy without substituting another in its place, contrary to the guaranties embodied in the Fourteenth Amendment to the Constitution of the United States.

III.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL

Defendant obviously considers its Paragraph III as the only real grounds for its motion. It essentially admits the jurisdiction of this court except for the reason stated therein, namely, that plaintiff should have appealed from the decision of the Compensation Commission. We have already pointed out (Paragraph II (2)) that the Michigan Court did not decide the case on this basis and therefore the argument is irrelevant. As this contention is merely repetitious of the argument in Paragraph II (2), *supra*, the answer contained therein is hereby incorporated by reference.

The statement "there might possibly have been a substantial federal question here if the appellant had appealed to the Supreme Court of Michigan from the adverse decision of the Compensation Commission and if the Michigan Supreme Court had affirmed the decision of the Compensation Commission • • •" is clearly an admission by the defendant that there is a substantial federal and constitutional question involved herein and that this Honorable Court should assume jurisdiction and render a decision on the questions raised.

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CONCLUSION

Counsel for plaintiff submit that this case presents a very substantial federal question. Large numbers of industrial employees suffer industrial injuries annually wherein no compensation is paid because the Compensation Commission lacks jurisdiction. In many of these cases the injury is due to the negligence of the employer. Consequently, a wrong is done and a remedy must exist. In the instant case, the decision of the Michigan Supreme Court denies the plaintiff a remedy for a wrong inflicted upon him and leave him remediless. This is clearly a deprivation of his constitutional rights.

That defendant's Motion to Dismiss does not contain a citation to a single federal case is indicative of the weakness of its position herein. We submit that this appeal is properly within the jurisdiction of this court.

Wherefore, plaintiff prays that the motion to dismiss be denied.

Respectfully submitted,

MORTON A. EDEN,
BENJAMIN MARCUS and
JEROME W. KELMAN,
Attorneys for Plaintiff and Appellant.

Dated: July 26, 1948.